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CONFLICT OF CIVIL AND CRIMINAL LAW

De Luca on Authority of Military Commissions in Time of Peace.—

An article, by Frances De Luca, entitled "*L'Essenza del ricorso in Carrazione e il capoverso dell' Art. 500 del nuovo codice di procedura penale*," in "*Il Progresso del Diritto Criminale*" (July-August, 1914), contains a strange acceptance of the American theory of government. "The Court of Cassation is instituted to maintain the exact observation of the law" (Art. 122, C. G. A.). It has, therefore, power to inquire into the constitutionality of the court below. De Luca, prior to the new code, held that this gave it jurisdiction to set aside judgments of military courts, sitting in times of peace ("*Il progresso*, etc.," Vol. II [1910] pp. 231-239) and the new code of penal procedure of 27 February, 1913 (Arts. 136, 500) has been drawn to remove all doubt of the correctness of his contention. Not satisfied with this, however, he now writes, following the English theory, "in fact, it cannot be denied that according to our laws (military and civil) no power is given—even to Parliament, subordinate, as it is, to the supreme fundamental law of the State—to form extraordinary commissions or courts in times of peace" (p. 216). Then adopting the American system, he desires the Court of Cassation to be given power to set aside judgments of the Senate sitting as a high court of justice, which he calls one of "the institutions of the past, left in our and other judiciary systems as antiquated and as fossilized." It is refreshing, after all we have heard of the recall of judges, to find our system of a supreme judiciary advocated from a source, not common but civil; not English or Germanic, but Roman.

J. L.

Gaetano Leto on the Conflict of Civil and Criminal Law in Cases Relating to Marriage.—Gaetano Lato has a long article in "*Il Progresso Del Diritto Criminale*" (May, June, July, Aug., 1914) in which he takes up the question of the conflict of civil and criminal law. For many civil matters must be decided in a criminal trial. There are many systems; the criminal judge must decide all civil matters, arising in a criminal suit; he must certify them all to the civil court; he must decide all incidental civil questions; or else that he may certify them.

He takes up civil questions of *status marriage*, a civil matter, which may affect bigamy, adultery, fornication, and incest. If the penal court decides this question incidentally one way and subsequently, a civil court decides it, as the principal question the other way, what can be worse? But, if the jurisdictions are to be separate, and the judges differently qualified, the criminal judge's decision cannot be given weight in the civil courts. The criminal judge must know all facts necessary to the case, but he need not decide them. If the defense to a charge of bigamy is no prior marriage, the criminal court, of natural competence, convicts or acquits the accused, his decision as far as the marriage is concerned simply stands that the celebration was or was not proved. He in no wise has taken upon himself civil jurisdiction. As the Romans well knew "*cognitio*" is not "*judiciarii*." The judge of the probate court, "*de haereditate cognoscit, universam incidentem quaestionem quae in iudicium devocatur, examinare, quoniam non de ca, sed de haereditate pronunciat*." The criminal court must know the facts, and, if the only way that he can know them is by a judgment by a court of competent jurisdiction, he should certify an issue, and the judgment thereon should be pleaded as a defense. It is evidence, of the fact. The district attorney can bring a civil suit in order to prepare his criminal prosecution. In fact, if the marriage appears to be but a relative nullity (where annulment is required to avoid, as where it is celebrated by an official without jurisdiction), it is the duty of the criminal court to certify an issue. In other words, Prof. Leto would have the criminal court certify all questions of public or private law to a judge of competent jurisdiction, when there is any doubt as to the facts.

In the courts in America, this question does not rise; men are convicted of bigamy and the legality of the first marriage is passed upon by quarter sessions. The question is not of the importance that it enjoys in Italy, because our civil judges do criminal work, but still it is of importance, for a man who has served a term for bigamy may have his marriage annulled as invalid in a subsequent civil court. In Pennsylvania, a statutory anomaly exists in that the innocent party to a bigamous union, declared as bigamous by the criminal court, cannot remarry, without obtaining a decree of annulment! In the latter proceedings, the record of the criminal court would be evidence of the prior marriage, and